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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex Parte Notice

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

On November 17, representatives of Comcast Corporation discussed digital must-carry issues with John Rogovin, Linda Kinney, Jeff Dygert, Joel Kaufman, and Susan Aaron, all of the Office of General Counsel. Comcast was represented at this meeting by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, and the undersigned.

These presentations covered topics that have been extensively discussed in recent *ex parte* submissions by Comcast, including particularly Comcast's letters of October 16 and November 10. We focused solely on legal issues pertaining to digital multicast must-carry. We discussed the statutory text, structure, history, and purpose of Section 614(b)(3) & (b)(4)(B) of the Communications Act, as explicated in previous submissions by Comcast (and by other cable operators and programmers, as well as by NCTA), and the violations of the First and Fifth Amendment rights of cable system operators that would result if broadcasters' must-carry rights are expanded to encompass multiple program streams.

We emphasized that today's market conditions are dramatically different, in a variety of ways, from those reflected in the legislative hearings of the late 1980's and early 1990's, the Conference Committee Report on the 1992 Cable Act, the statute's legislative findings, the briefs filed by the FCC and the broadcasters in the *Turner* cases, and the Supreme Court's *Turner* decisions themselves.[1] We

[1] Comcast's letter of October 16 noted certain key differences between 1992 and 2003: the explosive growth of multichannel video competition, including the emergence of two ubiquitous facilities-based satellite competitors and the more than 20 million households that subscribe to DBS, the dramatic decline in vertical integration between cable operators and cable programming networks, the massive decline in homes that rely on free over-the-air broadcasting, growing consumer preference for nonbroadcast programming from diverse sources, the Commission's decision to allow a single entity to hold two or in some cases three broadcast television licenses in a single market, and the growth in the number of broadcast licenses that are now held by companies that also own broadcast networks and multiple cable networks. *See*

reviewed reasons why a digital multicast must-carry requirement cannot be shown to advance the governmental interests identified in the *Turner* litigation and why, even if it could somehow be found to advance those interests, a multicast must-carry requirement cannot be assumed to impose only the "modest" burden on cable operators and cable programmers that a narrow majority of Justices believed was caused by the single-channel analog must-carry requirement enacted in 1992.[2]

We emphasized the importance of the D.C. Circuit's second *Time Warner Entertainment* decision[3] in underscoring the need for policymakers to take account of market changes and market dynamics. We also invoked the *Time Warner Entertainment* and *Turner* decisions to show that the Commission must not infringe cable operators' free speech and free press rights on the basis of *conjecture* about the extent to which broadcasters will be able to secure cable carriage of their multiple program streams absent governmental compulsion or *speculation* about the deterioration or demise of free over-the-air broadcasting if such carriage is not secured for some or all of the non-primary program streams that broadcasters transmit over the public airwaves.

We briefly discussed Fifth Amendment issues, summarizing the relevant portion of Comcast's letter of October 16,[4] and we reviewed points Comcast has presented in other recent letters relating to

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Comcast October 16 Letter at 1-3. There are of course additional differences as well. For examples: broadcasters have fewer public interest responsibilities than previously (and are resisting the application of existing public interest responsibilities to digital broadcasting), longer license terms, and greater renewal expectancies; the national TV audience cap has been raised; all broadcast regulations are now subject to biennial review and must be eliminated unless they are found to be "necessary in the public interest"; many cable systems now carry (and in many cases create) local and regional news, public affairs, and other community-oriented programming that vastly exceeds the "local" programming available from many TV broadcasters.

[2] It bears emphasis that most of the arguments in Comcast's November 10 letter concerning the "either/or" proposal also apply equally to a digital multicast must-carry requirement. For example, that letter explained that "[t]he detailed factual record amassed by Congress in several years of hearings, supplemented by another 18 months of detailed factual development by the District Court, allowed the [*Turner II*] majority to find that only 1.18 percent of the broadcast channels that were carried were added because of must-carry, that cable operators were able, despite must-carry, to continue to carry 99.8 percent of the channels that they previously carried, that 94.5 percent of cable systems did not have to drop any programming to make room for must-carry signals, and that the remaining 5.5 percent only had to drop 1.22 services from their line-ups." We noted there that "[n]o comparable findings have been made -- or could be made -- in the case of an 'either/or' approach." The same is equally true of a multicasting must-carry requirement.

[3] 240 F.3d 1126 (D.C. Cir. 2001).

[4] With regard to the Fifth Amendment argument, we assumed the continuing validity of the D.C. Circuit's ruling that, "[w]ithin the bounds of fair interpretation, statutes [must] be construed to defeat administrative orders that raise substantial constitutional questions" and therefore an FCC order allowing one party to occupy the private property of another should be struck down where the statute did not expressly require such a result. *See Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). In a subsequent case, one judge of the Circuit has questioned that outcome, contending that there was no constitutional problem (on the facts presented in *Bell Atlantic*) because, if the Commission's rule created a taking, the property owner would be entitled to and would receive just compensation, which is all that the Fifth Amendment requires. *See Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 101 (2001) (Randolph, J., concurring). Even under that view, the Commission should avoid a multicast must-carry requirement, first, because the availability of compensation cannot cure *First* Amendment violations and, second, because -- even if there were certainty (which there is not) that the *Fifth* Amendment problem would be avoided through a monetary remedy under the Tucker Act

lessons that should be drawn from the Commission's experience in telephone competition proceedings with collocation and TELRIC pricing requirements.

Finally, we discussed the favorable consumer response to the growing array of services that cable operators are delivering over upgraded cable facilities, including digital video programming, digital audio services, high-definition television, video-on-demand, high-speed cable Internet, and competitive phone services, and alluded to Comcast's efforts to develop additional new services including health care and energy management services. Each of these services consumes bandwidth, which is finite,[5] and all of them have significant public benefits -- as can best be demonstrated in an environment in which consumers' interests are secured through the operation of a competitive marketplace rather than by governmental coercion or favoritism.

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. Please let me know if you have any questions.

Respectfully submitted,

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James L. Casserly

cc: John Rogovin
Linda Kinney
Jeff Dygert
Joel Kaufman
Susan Aaron

-- it would be irresponsible for the Commission to use "statutory silence or ambiguity to *expose the Treasury to liability both massive and unforeseen*." *See Bell Atlantic,* 24 F.3d at 1445 (emphasis added).

[5] In the hours since our meeting with Mr. Rogovin *et al*., an article has appeared in which a spokesperson for the National Association of Broadcasters claims that the channel capacity of cable systems is "infinite." Bloomberg News, *FCC Is Expected to Reject 'Dual Must-Carry,"* Los Angeles Times, Nov. 18, 2003 (quoting NAB spokesman Dennis Wharton). That assertion is, of course, absurd. Given consumers' growing appetites for a wide range of video programming from diverse sources, and their interest in the additional services (such as high-speed Internet) that cable operators provide, to say nothing of the challenge of capital recovery for the massive investments that have expanded the bandwidth of the cable plant, cable operators actually face much more difficult bandwidth management issues today than they did a decade ago. If Mr. Wharton's point is that cable operators could expend additional private capital resources to expand the capacity of their systems even further, for the benefit of local broadcasters who received their spectrum for free, this argument is as infirm as the suggestion that "a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available." *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting that very argument as inconsistent with "economic reality").